

03-3423

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UNITED STATES COURT OF APPEALS  
EIGHTH CIRCUIT

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ALVIN L. PHIPPS; LINDA L. PHIPPS, et al.,

Plaintiffs-Appellants,

vs.

GUARANTY NATIONAL BANK OF TALLAHASSEE, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
Western District of Missouri, Case No. 03-cv-0420

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**APPELLANT'S BRIEF**

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## **SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT**

This appeal seeks the reversal of the district court's jurisdictional ruling and an order vacating the court's concomitant decision to dismiss Plaintiffs' claims for failure to state a claim.

The principal issue is whether the district court erred when it converted Plaintiffs' state law claims based on the violation of § 408.233.1 RSMo, a "non-interest" (consumer protection) limitation provision in the Missouri Second Mortgage Loans Act, into a federal law claim for excessive (usurious) "interest" under §§ 85 and 86 of the National Bank Act ("NBA") and the doctrine of "complete preemption." Plaintiffs contend that the district court's decision to convert their state law claims into federal law claims was improper and should be reversed since it ignored the express allegations of the Complaint and was contrary to the rules governing removal, preemption, and the federal law definition of "interest," which plainly excludes loan closing costs like those at issue here. The Complaint in this case properly pleaded what were purely state law claims based on the violation of § 408.233.1, a Missouri "non-interest" statute. Plaintiffs' claims were unquestionably beyond the preemptive reach of NBA §§ 85 and 86. As a result, the district court lacked jurisdiction and should have remanded the case.

Plaintiffs request 20 minutes per side for oral argument.

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## **JURISDICTIONAL STATEMENT**

This appeal arises from the district court's decision to assume jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1331 on Defendants' joint Notice of Removal (JA015) and the doctrine of "complete preemption" and the court's concomitant rulings (1) to deny Plaintiffs' Motion to Remand (JA099) and (2) to grant Defendants' Fed.R.Civ.P. 12(b)(6) motions to dismiss. (JA161; JA167) The district court memorialized its rulings in an Order and Judgment entered September 17, 2003. (Ad. 1-10, 11) The Order and Judgment constitute a final, appealable decision since they disposed of all the parties' claims. (Id.) Plaintiffs filed a timely appeal on September 30, 2003. (JA427) This Court has jurisdiction to review the district court's Order and final Judgment pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

- I. Whether the district court erred by denying Plaintiffs' Motion to Remand on the grounds that Plaintiffs' state law claims, which were based on what Plaintiffs expressly alleged to be "non-interest" charges assessed in violation of state law, namely § 408.233.1 of the Missouri Second Mortgage Loans Act, were "completely preempted by NBA §§ 85 and 86 (which pertain to "interest" only).

Hancock v. Bank of America, 272 F.Supp.2d 608 (W.D. Ky. 2003)

Video Trax, Inc. v. NationsBank, NA, 33 F.Supp.2d 1041 (S.D. Fla. 1998),  
aff'd, 205 F.3d 1358 (11<sup>th</sup> Cir.), cert. denied, 531 U.S. 822 (2000)

Smiley v. Citibank (South Dakota) N.A., 517 U.S. 735 (1996)

Goleta Nat. Bank v. Lingerfelt, 211 F.Supp.2d 711(E.D.N.C. 2002)

§§ 408.231 to 408.562 RSMo

12 U.S.C. § 85

12 C.F.R. 7.4001

- II. Whether the district court erred by granting Defendants' Fed.R.Civ.P. 12(b)(6) motions to dismiss and entering judgment in favor of all defendants as a matter of law on the grounds that Plaintiffs could not state any viable claim against any defendant upon which relief could be granted even though Plaintiffs' state law claims were based on what Plaintiffs expressly alleged to be "non-interest" charges assessed in violation of § 408.233.1 of the Missouri Second Mortgage Loans Act.

Nichols v. Harbor Venture, Inc., 284 F.3d 857 (8<sup>th</sup> Cir. 2002)

§§ 408.231 to 408.562 RSMo

## STATEMENT OF THE CASE

On April 3, 2003, Plaintiffs Alvin and Linda Phipps, John and Elizabeth St. Clair, and Shawn and Lorene Starkey (“Plaintiffs”), for themselves and on behalf of a class of similarly situated persons, filed this lawsuit in the Circuit Court of Clay County, Missouri. (JA022) Plaintiffs, who are all Missouri homeowner-borrowers, alleged in their state court petition that they and numerous other Missouri homeowner-borrowers were victims of a predatory lending scheme in which Defendant Guaranty National Bank of Tallahassee (“GNBT”) was used as a “front” by certain non-bank entities to “make” and “sell” residential second mortgage loans. The intended purpose of Defendants’ ruse was simple: To allow the non-bank entities to avoid state consumer protection laws, Missouri’s among them. Such laws ordinarily govern the origination of residential second mortgage loans. By using a national bank as a “front” to make the loans, Defendants hoped to avoid the application of the laws of the state in which the borrowers resided, and thereby charge and receive closing costs for their loans in types and amounts greater than what the laws of the borrowers’ “home” state allowed. (OP, ¶¶1-4, 5-24, 25-32 & 33-39)<sup>1</sup>

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<sup>1</sup> “OP” refers to Plaintiffs’ Original Petition, and is included in the Joint Appendix (“JA”) at JA022-JA060. Plaintiffs filed a First Amended Complaint for Damages on May 15, 2003. (JA061) The differences between the Original Petition and the First Amended Complaint are not material for purposes of this appeal. “Add.” refers to the Addendum.

Plaintiffs brought their claims against Defendants under the Missouri Second Mortgage Loans Act, §§ 408.231 RSMo, et seq. (“SMLA”). In their petition (referred to as the “Complaint”), Plaintiffs alleged that they, and numerous other Missouri homeowner-borrowers, obtained a Missouri residential second mortgage loan ostensibly from GNBT, but that non-bank entities actually made and/or facilitated the manner in which GNBT was used as a “front” to make the loans (OP, ¶¶5-32).<sup>2</sup> Plaintiffs further alleged that each of the loans was subject to and violated Missouri law, specifically the non-interest limitation provision in the SMLA, § 408.233.1 RSMo. (Id., ¶¶88-98)

On the basis of this Missouri statutory cause of action, Plaintiffs, both personally and for all other Missouri homeowner-borrowers similarly aggrieved by Defendants’ unlawful acts and lending practices, sought to recover all of the unlawful loan closing costs that they were charged and/or paid in violation of § 408.233.1 RSMo. (OP, ¶¶88-98) In addition, Plaintiffs, on the basis of that statutory violation, sought to recover all of the interest that they had paid for their

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<sup>2</sup> Plaintiffs alleged in their Complaint that the non-bank entities directly involved in the scheme to avoid state law were Equity Guaranty LLC and its affiliates. (OP, ¶¶5-32) Plaintiffs further alleged that the Equity Guaranty affiliates were empowered to do what they did by virtue of the promises and funds that they received from the “GMAC-RFC Defendants.” (Id.) The “GMAC-RFC Defendants” are GMAC-Residential Funding Corporation, Residential Funding Mortgage Securities II, Inc., JP Morgan Chase Bank, Wilmington Trust Company, and Homecomings Financial Network, Inc. This is not the only “rent-a-charter” case involving Equity Guaranty and the GMAC-RFC Defendants. See Terry v. Community Bank of Northern Virginia, 255 F.Supp.2d 817 (W.D. Tenn. 2003).

unlawful second mortgage loans, and an order barring the collection of any interest not yet due. Plaintiffs sought this relief not because the rate of interest they were charged was excessive, but because § 408.233.1 had been violated. (OP, ¶¶91-98 & Prayer for Relief) Missouri law makes these remedies available to Missouri homeowner-borrowers like Plaintiffs, who are aggrieved by a violation of § 408.233.1. §§ 408.236, 408.562 RSMo. 2000.

**I. The Missouri Second Mortgage Loans Act Regulates both the “Interest” and “Non-Interest” Aspects of Residential Second Mortgage Loans**

The Missouri General Assembly enacted the SMLA in 1979 as a part of the “Omnibus Credit Reform Bill.” See generally Geary, Missouri’s Omnibus Credit Reform Bill, 35 J.Mo. Bar 376, 378 (Sept. 1979).<sup>3</sup> The SMLA governs second mortgage loans secured by Missouri residential real estate and regulates both the “interest” and “non-interest” aspects of such loans. See U.S. Life Title Ins. Co. v. Brents, 676 S.W.2d 839, 841(Mo. Ct. App. 1984) (the SMLA represents “... the adoption of a fairly comprehensive scheme, covering various aspects of the business of making high-interest second mortgage loans on residential real estate”). The permissible rate of interest that a second mortgage lender can charge a Missouri borrower under the SMLA is fixed by § 408.232.1 RSMo and is but one component of the state regulatory scheme. A second component is the “non-

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<sup>3</sup> Reproduced in the Joint Appendix at JA278-284.

interest” and consumer protection measures contained in and made applicable to the SMLA, including limits on declarations of default, acceleration, the right to cure, and foreclosure, § 408.233, §§ 408.552 to 408.562 RSMo, and, most importantly for this case, the prohibitions against excessive and/or unauthorized non-interest closing costs in § 408.233.1.

Since its enactment in 1979, the SMLA has permitted lenders to charge interest for second mortgage loans at rates greater than Missouri’s maximum lawful (or usury) rate.<sup>4</sup> § 408.232.1 RSMo. As a trade-off for the “benefit” of allowing a lender to charge more than the Missouri “usury” rate, the Missouri legislature “burdened” such loans with a number of **non-interest** regulations, including limits on the type and amount of closing costs that can permissibly be “charged, contracted for or received” in connection with a second mortgage loan. § 408.233.1 RSMo; Geary, 35 J.Mo. Bar at 378 (“Section 408.233 prohibits any charges other than those expressly permitted ...”). All of the loan charges on which Plaintiffs based their claims were non-interest charges of the type prohibited by § 408.233.1.

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<sup>4</sup> Missouri’s usury or “maximum lawful rate” is 10% or the “market rate,” whichever is greater. § 408.030.1 RSMo. 2000. The Missouri “market rate” of interest is published by the Missouri Division of Finance on its website. (Add. at 19)

## II. § 408.233.1 RSMo

The wording of § 408.233.1 RSMo has not changed materially since it was originally enacted as a part of the SMLA in 1979. In pertinent part, the statute provides:

### **408.233. Additional charges authorized.**

1. No charge other than that permitted by section 408.232 [i.e., interest] shall be directly or indirectly charged, contracted for or received in connection with any second mortgage loan, except ...

\* \* \*

(3) Bona Fide closing costs paid to third parties, which shall include:

(a) Fees or premiums for title examination, title insurance, or similar purposes including survey;

(b) Fees for preparation of a deed, settlement statement, or other documents;

(c) Fees for notarizing deeds and other documents;

(d) Appraisal fees; and

(e) Fees for credit reports;...

(5) A nonrefundable origination fee not to exceed five [formerly two] percent of the principal.

§ 408.233.1 RSMo 2000 (emphasis and edits added). The SMLA makes clear that such “additional charges” are not “interest.” Id.; see § 408.231.2 RSMo 2000 (defining “principal” of a second mortgage loan as the “total of the net amount paid to, received by, contracted for, or paid or payable for the account of the borrower, and to the extent payment is deferred [as was the case here] additional

charges permitted by section 408.233”).

### **III. Course of Proceedings and the Disposition Below**

By Notice dated May 13, 2003, Defendants jointly removed the case and Plaintiffs’ state law claims to the district court pursuant to 28 U.S.C. § 1441(a). (JA015) In their Joint Notice, Defendants alleged that removal was proper on the grounds that “this action ... raises a substantial federal question, giving this Court original jurisdiction pursuant to 28 U.S.C. § 1331.” (Id., ¶7) Specifically, Defendants asserted that Plaintiffs’ state law claims under the SMLA “for allegedly excessive fees relate to ‘interest,’ as defined by the office of Comptroller of Currency, charged in connection with loans funded and made by a national bank and such interest charges are [completely preempted and] regulated solely by [NBA, §§ 85 and 86].” (Id., ¶¶7-11, 15) Defendants did not amend their removal notice.

On June 9, 2003, Plaintiffs moved the district court to remand the case to state court on the grounds that (1) the court did not have original jurisdiction over the subject matter of the controversy under 28 U.S.C. § 1331 as Plaintiffs did not state any claim for excessive or usurious **interest** under state or federal law and (2) the district court had previously held in a similar Missouri second mortgage case, Adkison v. FirstPlus Bank, No. 00-622, slip op. (W.D. Mo., Jan. 22, 2001), that the court did not have federal question jurisdiction over state law claims premised on

**non-interest** charges nearly identical to those at issue here. (JA099) (A copy of the district court's unpublished decision in the Adkison case is contained in the Appendix at JA126-151).

In lieu of filing answers, Defendants filed three (3) different motions to dismiss. GNBT and the GMAC-RFC Defendants filed the two (2) motions to dismiss at issue on appeal. (JA161; JA167) Defendants' filed both motions on June 16, 2003. In essence, Defendants urged the district court to dismiss the Complaint pursuant to Fed.R.Civ.P 12(b)(6) on the grounds that (1) federal law preempted Plaintiffs' state law claims under the SMLA and (2) Plaintiffs failed to state a viable claim under the SMLA in any event. (Id.)

The district court issued its decisions with regard to the parties' motions on September 17, 2003. The district court concluded that each of the different loan closing costs on which Plaintiffs based their claims was "interest" and that Plaintiffs' Missouri state law claims based on the violation of the SMLA, § 408.233.1 and § 408.562, were actually federal law claims for excessive (usurious) "interest" under NBA §§ 85 and 86. (Add. 10-11) With the resolution of this disputed issue in place, the district court then determined that it had federal question jurisdiction over Plaintiffs' state law claims pursuant to the doctrine of "complete preemption" and dismissed the Complaint for failure to state a federal law claim. (Id. at 10-12)

In reaching its decisions, the district court ignored the express allegations of the Complaint and found that the “finder’s fees” on which Plaintiffs in part based their claims constituted “interest.” (Add. at 10-11 & n. 10) The district court reached this decision in spite of the OCC definition that specifically excludes “finder’s fees” from the definition of interest. 12 C.F.R. § 7.4001. The district also held that, under the OCC definition: (1) “interest” charges are charges that “are generally not collected unless a loan is actually made” and (2) non-interest charges are “appraisal fees, and fees for obtaining credit reports” and other fees that “... are incurred regardless of whether the loan is advanced or not.” (Add. at 10-11) Despite this distinction, the district court nevertheless determined that the “settlement/closing,” “document review,” “processing” and other loan closing costs on which Plaintiffs’ based their state law claims were “interest” too. (Id.) The court did not address Defendants’ argument that Plaintiffs failed to state a viable state law claim under the SMLA since consideration of that argument, by definition, would have meant the district court lacked subject matter jurisdiction. (Id. at 4 n.3 & 11-12)

### **STATEMENT OF THE FACTS**

The facts in this case come from Plaintiffs’ original state court petition (JA022), the allegations of which must be presumed as true. (See *infra* 34) The Complaint (“OP”) established the following:

Plaintiffs are Missouri homeowner-borrowers who were charged unlawful closing costs in connection with a second mortgage loan secured by their Missouri homes. (OP, ¶¶1, 60-78) Like each of the members of the proposed plaintiff class they seek to represent, Plaintiffs obtained their second mortgage loans ostensibly from GNBT, a Florida-based national bank. (OP, ¶¶1, 5-39, 60) Although each of the subject loans was “made” in GNBT’s name, other non-bank entities (e.g., Equity Guaranty and its affiliates) actually originated and/or financed the loans from Virginia and elsewhere. (Id., ¶¶5-39) These non-bank entities, alone and in conjunction with the GMAC-RFC Defendants, used GNBT as a “front” in an attempt to avoid the SMLA and charge closing costs of a type and in amounts that Defendants irrefutably would have been prohibited from charging or collecting in Missouri. (Id.)<sup>5</sup>

Each of the second mortgage loans at issue in this case was a “residential second mortgage loan” within the meaning of Missouri law and the SMLA. (OP, ¶¶1, 61-62, 88). Plaintiffs were each charged interest for their respective loans at certain rates (Id., ¶¶4, 69 (16.99%), ¶72 (11.99%), ¶75 (11.99%)), all of which

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<sup>5</sup> Plaintiff’s allegation that Defendants “rented” GNBT’s charter to “make” the loans and avoid Missouri law is not far-fetched. The OCC has voiced its concerns about this very practice. See NR 2002-10, Office of the Comptroller of the Currency (Feb. 12, 2002) (“The benefit that national banks enjoy by reason of [federal preemption] cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank. Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.”) (Add. at 23-24)

exceeded Missouri's "maximum lawful rate" at the time. See § 408.030.1 RSMo. 1994 and Usury Rate History. (Add. at 19) Each of the subject second mortgage loans also violated Missouri law since the borrowers were charged and/or paid certain "loan discount" and "loan origination" fees that were actually impermissible "finder's fees," as well as other "non-interest" costs (viz., "underwriting," "application," "settlement/closing," "abstract or title search," "title examination," "document review" and "processing" fees) that the SMLA, § 408.233.1, prohibited second mortgage lenders from charging or receiving. (Id., ¶¶4, 5, 8, 23-24, 66-67, 69-78, 90) Plaintiffs expressly alleged that the unlawful closing costs on which they based their claims were NOT interest and were included in the principal amount of their loans, having been financed over the term of the loans as part of the principal loan amounts. (Id., ¶¶1-4, 68, 78) The HUD-1 Statements for each Plaintiff's loan, as offered by Defendants, showed that all of the closing costs at issue were assessed for a particular service (e.g., completing, processing and recording the paperwork to make and memorialize the loan) and were thus fees assessed for something other than merely lending the money. (Add. 20-22)

Although the district court read the Complaint as alleging that Plaintiffs paid GNBT all of the loan closing costs and that [GNBT] turned around and paid all or a portion of these costs to Equity Guaranty as a finder's fee" (Add. at 11 n.4), this

reading was contrary to what Plaintiffs actually alleged. The district court also inexplicably read the Complaint as establishing that each of the subject loan transactions was negotiated and executed in good faith, and that there was no scheme undertaken to avoid the application of Missouri's consumer protection laws. That is not what Plaintiffs alleged and assert that they can prove. The Complaint in part stated:

5. Plaintiffs and the Plaintiff Class ... were the victims of a predatory lending scheme to charge to them bogus and illegal fees and charges, together with charging high interest rates all as part of a scheme to make high-cost loans to Missouri borrowers, as well as borrowers across the country. Such bogus and illegal fees were unlawful under Missouri's SMLA and were, in part, falsely characterized as origination fees, discount fees or other types of fees and charges that were represented to be paid to GNBT, but were instead paid, directly or indirectly, in whole or in substantial part to Equity Guaranty LLC or an affiliated entity thereof and were in fact in the nature of finder's fees and were to the extent relevant to this action, and in any event, non-interest charges.

\* \* \*

7. With respect to the loan origination fees and the loan discount charges that were according to the HUD-1 Settlement Statement payable to GNBT at or before closing, such loan origination fees and loan discount charges were in fact falsely and fraudulently paid to Equity Guaranty LLC or an affiliated entity that was controlled by Equity Guaranty LLC or the controlling owners of Equity Guaranty LLC, who in fact in a conspiracy with GNBT and with the knowledge of GMAC-RFC, set up the entire fraudulent scheme in order to give the appearance of making these loans through a national bank in order to allegedly avoid the consumer protection laws of the states in which Equity Guaranty LLC targeted as states in which these predatory loans were to be made.

8. Equity Guaranty LLC and GNBT were in fact engaged in an illegal “rent-a-charter” scheme wherein Equity Guaranty LLC, in effect, illegally rented GNBT’s national banking charter in an effort to make the aforementioned predatory loans, and in an effort, although unsuccessful even on its face, to avoid and conceal liabilities for violating the consumer protection laws of the various states, including the State of Missouri and including their efforts to contract for, charge and receive the illegal origination fees, discount fees and the illegal underwriting and application fees and the illegal settlement, document review and processing fees, all of which were necessary to fund the illegal lending machine set up by GNBT, Equity Guaranty LLC and to supply loans to such holders as GMAC-RFC, RFMS or Household or their Trustees Wilmington Trust and Chase Manhattan, either for their own inventory or for purposes of consolidating such loans and placing them into securitization pools, all of which were extremely profitable to such consolidators.

\* \* \*

17. This business scheme, however, had a unique twist. Instead of pursuing these loans through entities that were owned or controlled by the owners of Equity Guaranty LLC or its affiliated predecessors, they pursued such by what facially appeared to be state-chartered or national banks, all part of an illegal “rent-a charter” scheme involving the charters of those state-chartered or national banks.

18. This scheme was intended to give the false appearance that the otherwise illegal charges and fees were paid to the state-chartered or national bank and that such would “wash” those charges and fees from what would otherwise be violations of various consumer protection laws.

\* \* \*

20. The substantial operations for promoting and making these loans were conducted in whole or substantial part not at the offices of GNBT, but at Equity Guaranty LLC’s offices or the offices of an affiliated entity, first at 11417 Sunset Hills, Reston, Virginia, 20190 and then at 4501 Singer Court, Chantilly, VA 20151, which expanded space was necessary to accommodate the vastly expanding

mortgage business that was being conducted in the nominal name of GNBT, but in fact by Equity Guaranty LLC and its affiliated entities.

\* \* \*

23. GNBT's only real compensation for its agreement to permit loans to be made in its name was the interest float generated between the date of loan funding and the date on which the loan was purchased by a subsequent purchaser, who was most often predetermined to be GMAC-RFC or its Securitized Trusts.

24. Notwithstanding the Settlement Statements showing that GNBT received certain origination, discount, and other fees charged to the plaintiffs and members of the Plaintiff Class, those fees were in fact paid to Equity Guaranty LLC (or the owners of Equity Guaranty LLC), or to an entity controlled by Equity Guaranty LLC (including USA Title LLC), or to an entity controlled by the owners of Equity Guaranty LLC.

(OP, ¶¶5, 7, 8, 17, 18, 20, 23, 24) (emphasis added).

### **SUMMARY OF THE ARGUMENT**

The Court should reverse the district court's jurisdictional determination and holding that NBA §§ 85 and 86 "completely preempts" Plaintiffs' state law SMLA claims. This case simply does not arise under federal law. The claims in this case singularly arise from the violation of a Missouri state law, specifically § 408.233.1 RSMo of the SMLA, and are thus beyond the preemptive reach of NBA §§ 85 and 86.

Contrary to what the district court decided, Plaintiffs' state law claims under the SMLA were neither inconsistent with nor completely preempted by § 85 and 86 of the National Bank Act ("NBA"), which pertain solely to the **"rate of**

**interest”** a national bank can charge. 12 U.S.C. § 85. Plaintiffs’ claims were not based on excessive or unlawful interest. Plaintiffs did not allege that the interest they were charged for their second mortgage loans was greater than the rates allowed by 12 U.S.C. § 85 or a state usury rate statute, as was the case in both Beneficial Nat’l Bank v. Anderson, 123 S.Ct. 2058 (2003) and M. Nahas & Co. v. First Nat’l Bank of Hot Springs, 930 F.3d 608 (8<sup>th</sup> Cir. 1991). Nor did Plaintiffs allege that they were charged any loan closing costs that constituted “interest” charges as a matter of federal law, as was the case in Krispin v. May Dep’t Stores, Inc., 218 F.3d 919 (8<sup>th</sup> Cir. 2000).

To the contrary, Plaintiffs expressly alleged that Equity Guaranty and its affiliates, using GNBT as a “front,” charged Plaintiffs **“finder’s fees”** and other **non-interest** charges “that were, in fact, **not** interest and were non-interest in nature,” and that the same were included as a part of the principal loan amounts. (OP, ¶¶4, 68, 78) Such “principal” charges, by definition, are not “interest.” Such charges are also expressly excluded from the definition of interest by federal law. See, e.g., 12 C.F.R. 7.4001. The district court’s contrary decision resulted from the following errors:

First, the district court ignored the express allegations of the Complaint which established that (1) that non-bank entities, not GNBT, effectively made the second mortgage loans at issue (OP, ¶¶5-32), which rendered the NBA (i.e, federal

law) inapplicable to the loans and Plaintiffs' claims; (2) that the loan "origination," "discount," "underwriting," and "application" fees were not paid to the GNBT, but "were instead paid, directly ... to Equity Guaranty ... or an affiliated entity...." (OP, ¶¶5, 23, 24);<sup>6</sup> and (3) that the closing costs on which Plaintiffs' based their claims were non-interest charges that violated § 408.233.1, which gave Plaintiffs a viable Missouri state law cause of action and remedy under the SMLA, §§ 408.236, 408.562 RSMo 2000. The district court could not rightly conclude in the face of these allegations that the Complaint stated a claim for unlawful "interest" and was therefore subject to federal court jurisdiction under the doctrine of complete preemption – particularly since a court, when considering a motion to remand, must focus on the complaint at the time the petition for removal was filed and must assume as true all factual allegations of the complaint, resolving all doubts in favor of remand.

Second, the district court misinterpreted and/or misapplied the federal definition of "interest" as stated by the Office of Comptroller of Currency ("OCC"). The district court held that whether a closing cost is "interest" depends on whether the particular cost (a) "generally [goes uncollected] unless [the] loan is

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<sup>6</sup> There is no dispute that the remaining loan charges (viz., the "settlement/closing," "abstract or title search," "title examination," "document review" and "processing" fees) were paid to an entity other than GNBT. (OP, ¶¶71, 74, 77 & Add. 20-22: lines 801-02, 811, 813, 1101, 1112, 1113)

actually made” (i.e., interest) or (b) is “generally incurred regardless of whether the loan is advanced or not” (i.e., non-interest). (Add. at 10) This is not the proper test. The OCC definition identifies “appraisal fees,” “document preparation” and notarization fees” as non-exclusive examples of **non-interest** charges; yet, logically, these fees generally are “not collected unless [the] loan is actually made.” See 12 C.F.R. § 7.4001(a). The court’s misinterpretation of § 7.4001(a) compounded its misreading of the Complaint.

Third, the district court erred by glossing over the fact as established by the Complaint that there were two distinct groups of closing costs that the Complaint showed as being charged and/or received in violation of § 408.233.1: (1) the loan “origination,” “discount,” and other fees (e.g., “underwriting” and “application” fees) that were in fact “finder’s fees” paid to one or more non-bank entities (not GNBT); and (2) the “settlement/closing,” “abstract or title search,” “title examination,” “document review” and “processing” fees (and also perhaps the “underwriting” and “application” fees) that were paid to USA Title or some other non-bank entity. (OP, ¶¶4, 5, 7, 23, 24, 71, 74, 77) Even if the first group of loan charges can be deemed to be “interest” for purposes of the NBA, which Plaintiffs deny, the charges in the second group cannot. Consequently, Plaintiffs undeniably stated and possessed a valid, subsisting and non-preempted state law SMLA claim against Defendants.

Fourth, the district court erred by concluding that NBA §§ 85 and 86 completely preempt cases like this one, where the state law claims are not indisputably based on “interest” charges. Even though Congress may have expressly intended for NBA §§ 85 and 86 to completely preempt state law claims against a national bank for usurious “interest,” there is no indication that Congress likewise intended to vest the determination of whether or not a particular loan charge is in fact “interest” exclusively with the federal courts too. The state courts, just like the federal courts, can make this determination in the cases filed before them, provided that the state law claims are, like those at issue here, not indisputably based on “interest” charges. If the charges are indisputably “interest,” then the state court admittedly has no jurisdiction over the claims; however, if the charges are not interest or if the nature of the charges is disputed, then the state court should retain jurisdiction over the case up until the point, if ever, that the charges are conclusively shown to be “interest.” Moreover, even if the district court did have the exclusive right to determine whether the loan charges here were “interest,” the court’s determination was incorrect. Defendants did not come forward with any evidence to conclusively refute the allegations of the Complaint, which clearly established that all of the loan charges on which Plaintiffs based their state law claims were non-interest charges (e.g., by showing that GNBT, as lender, actually received and kept the various fees and/or that all of the fees were assessed

merely for making the loan). Defendants did not meet their burdens on removal. As a result, Plaintiffs' claims were beyond the boundaries of "complete" NBA preemption.

Finally, and in addition to reversing the district court's jurisdictional ruling, the Court should vacate the district court's concomitant decision to grant Defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim. As stated above, the district court did not have jurisdiction over the subject matter of this case, and thus, the court was without the authority to resolve Defendants' motions to dismiss.<sup>7</sup>

## **ARGUMENT**

### **I. Standard of Review**

The standard of review applicable to the district court's decision to deny Plaintiffs' Motion to Remand (JA099) is *de novo*. Nichols v. Harbor Venture, Inc., 284 F.3d 857, 860 (8<sup>th</sup> Cir. 2002). The standard of review for the district court's decision to grant Defendants' motions to dismiss for failure to state a claim (JA161; JA167) also is *de novo*. Rucci v. The City of Pacific, 327 F.3d 651, 652 (8<sup>th</sup> Cir. 2003).

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<sup>7</sup> The district court correctly decided that, absent complete preemption, the Missouri state courts would have to decide the viability of Plaintiffs' state law claims and the other defenses, including ordinary preemption, that Defendants raised in their motions to dismiss. (Add. at 4 n.3 & 11-12)

## **II. Removal and Federal Question Jurisdiction**

A defendant may remove an action from state to federal court when the federal district court has “original jurisdiction founded on a claim or right arising under” federal law. See 28 U.S.C. § 1441(b). The procedural staple for determining the presence or absence of a federal question is the “well-pleaded complaint rule.” Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475. This procedural rule provides that a case may be removed to federal court only if the plaintiff’s properly pleaded complaint reveals that the plaintiff’s claim “arises under federal law.” Beneficial Nat’l Bank v. Anderson, 123 S.Ct. 2058, 2062 (2003); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987); Krispin v. May Dep’t Stores, Inc., 218 F.3d 919 (8<sup>th</sup> Cir. 2000).

To determine whether a claim “arises under federal law,” a court examines the allegations of the complaint and ignores potential defenses: “[A] suit arises under [federal law] only when the plaintiff’s statement of his own cause of action shows that it is based upon [federal law].” Anderson, 123 S.Ct. at 2062. It is not enough that the complaint alleges facts that trigger a defense under federal law, even the defense of federal preemption. Rivet, 522 U.S. at 475; Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 9-10 (1983). “Congress has long since decided that federal defenses do not provide a basis for removal.” Caterpillar, 482 U.S. at 399; Magee v. Exxon Corp., 135 F.3d 599, 601

(8<sup>th</sup> Cir. 1998) (“Federal-question jurisdiction is not created by a federal defense, including the defense of preemption, even if the defense is the only contested issue in the case”).

Therefore, under the well-pleaded complaint rule, a plaintiff can elect to keep his case in state court by filing only state law claims. The plaintiff, of course, runs the risk that those state law claims will be dismissed if in fact they are preempted by federal law. That decision, however, is the plaintiff’s to make. The plaintiff “is master to decide what law he will rely upon,” The Fair v. Kohler Die Specialty Co., 228 U.S. 22, 25 (1913), and thus has the prerogative to rely on state law alone, even though both state and federal law may give him a cause of action. Caterpillar, 482 U.S. at 392 (a plaintiff “may avoid federal jurisdiction by exclusive reliance on state law”); First Nat’l Bank of Aberdeen v. Aberdeen Nat’l Bank, 627 F.2d 843, 850 (8th Cir. 1980) (“party who brings a suit is master to decide whether his claim ... [arises under federal law]”); see Nelson v. Associates Financial Services, Co., 79 F.Supp.2d 813, 816 (W.D. Mich. 2000) (“‘Removal and preemption are two distinct concepts,’ and the fact that plaintiffs’ claim might ultimately prove to be preempted does not establish that it is removable to federal court”); Kenney v. Farmers Nat’l Bank, 938 F.Supp. 789, 791 (M.D. Ala. 1996) (“[t]he fact that plaintiff has elected to pursue his claim under state law alone does not justify removal even if the plaintiff also has an unpursued claim under federal

law.”)

A **narrow** exception and corollary to the well-pleaded complaint rule is the “complete preemption” doctrine. Anderson, 123 S.Ct. at 2062, 2063; Krispin, 218 F.3d at 922; Magee, 135 F.3d at 601. Under this doctrine, a defendant may remove a case to federal court even though the plaintiff only raises state-law claims in the complaint. Such complete preemption occurs only when Congress expressly so provides, e.g., 42 U.S.C. § 2014(hh), or when the preemptive force of a federal statute is so “extraordinary” that it wholly displaces a preempted state law cause of action and “converts” the preempted state law claim into a claim “arising under federal law.” Anderson at 2062, 2063; Hancock v. Bank of America, 272 F.Supp.2d 608, 610 (W.D. Ky. 2003) (quoting Caterpillar, supra in the context of a case similar to this one); see Rivet, 522 U.S. at 475 (“artful pleading doctrine allows removal where federal law completely preempts a plaintiff’s state-law claim”).

Although often confused, the doctrine of complete preemption is different from the defense of ordinary preemption. See Magee, 135 F.3d at 602-03. Ordinary preemption is a defense that may be raised in either state or federal court. As a defense, ordinary preemption does not appear in the plaintiff’s well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. Caterpillar, 482 U.S. at 393. In contrast, the complete preemption

doctrine gives a defendant the ability to remove a case to federal court since the doctrine converts an otherwise preempted state law claim into an action that arises under federal law. See Anderson, 102 S.Ct. at 2065 (Scalia, J., dissenting). “The complete preemption doctrine applies only when a federal statute possesses ‘extraordinary pre-emptive power,’ a conclusion courts reach reluctantly.” Magee, 135 F.3d at 601.

### **III. The District Court Should Have Remanded this Case to State Court Because NBA §§ 85 and 86 do not Completely Preempt Plaintiffs’ State Law Claims for Unlawful Finder’s Fees and Other “Non-Interest” Charges**

Sections 85 and 86 of the National Bank Act “serve distinct purposes.” Anderson, 123 S.Ct. at 2063. Section 85 “sets forth the substantive limits on the rates of interest that national banks may charge” as the “rate allowed by the laws of the State ... where the [national] bank is located.” Id. (emphasis added) Section 85 in part provides:

**Any association may take, receive, reserve, and charge on any loan ... interest at the rate allowed by the laws of the State ... where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety- day commercial paper in effect at the federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more ...**

12 U.S.C. § 85. (Emphasis added.) Section 86 of the NBA “sets forth the elements of a usury claim against a national bank, provides for a 2-year statute of limitations for such a claim, and prescribes the remedies available to borrowers who were

charged higher rates and the procedures governing such a claim.” Anderson at 2063 (emphasis added).

As the language of §§ 85 and 86 makes clear, the coverage of the statutes is limited to “interest” (and those charges properly deemed to be “interest”). The statutes do not extend to or displace any state law that pertains to **non-interest** charges. Hancock, 272 F.Supp.2d at 610 (“preemptive force of NBA §§ 85 and 86 does not exist with respect to claims based on unlawful assessment of “non-interest” service fee); Video Trax, Inc. v. NationsBank, NA, 33 F.Supp.2d 1041, 1048 (S.D. Fla. 1998) (bank overdraft fee was not “interest,” and thus, usury provisions of NBA did not apply), aff’d, 205 F.3d 1358 (11th Cir.), cert. denied, 531 U.S. 822 (2000); Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297, 1303 (8<sup>th</sup> Cir. 1997) (non-interest charges which “form[ed] the basis of this cause of action [did] not amount to a violation of the [NBA]”); see also Anderson, 123 S.Ct. at 2064 (§§ 85 and 86 [of the NBA] provide the exclusive cause of action for ... state-law claim of usury”); Evans v. National Bank of Savannah, 251 U.S. 108, 111 (1919) (“[The NBA] adopts usury laws of the states only in so far as they severally fix the rate of interest”); Krispin, 218 F.3d at 922-23 (state law claims “implicated” NBA and supported removal because claims were based on credit card late fees, which are deemed “interest”) (citing Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744-47 (1996)).

The conclusion that preemption under NBA §§ 85 and 86 is limited solely to “interest” is consistent with federal court decisions that have recognized and affirmed the general applicability of state laws to national banks. For example, in Hancock, the district court found that §§ 85 and 86 of the NBA did not preempt, completely or otherwise, the plaintiff-mortgagees’ state law claims against a national bank for the unlawful assessment of a non-interest (fax) fee. 272 F.Supp.2d. at 610. Similarly, in Video Trax, the district court observed: “Banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus, state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation.” 33 F.Supp.2d at 1041. The Supreme Court, too, has repeatedly recognized that national banks remain subject to regulation by the states. See, e.g., McClellan v. Chipman, 164 U.S. 347, 359 (1896) (holding instead that state laws govern the business transactions of national banks except in areas where Congress expressly preempts state law or state law would impair the banks’ efficiency in carrying out their duties imposed by federal law); Davis v. Elmira Savings Bank, 161 U.S. 245, 290 (1896) (“Nothing of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purpose of Congressional legislation.”); First Nat’l Bank in St. Louis v. Missouri, 263 U.S.

640, 656 (1924) (national banks “are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States.”); Anderson National Bank v. Lockett, 321 U.S. 233, 244-52 (1944) (“National banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks’ functions.”); Franklin Nat’l Bank v. New York, 347 U.S. 373, 378 n.7 (1954) (“National banks may be subject to some state laws in the normal course of business if there is no conflict with federal law.”); Atherton v. FDIC, 519 U.S. 213, 222-23 (1997) ( “federally chartered banks are subject to state law”).

**A. Plaintiffs’ Well-Pleaded Complaint did not Invoke NBA §§ 85 or 86 since the Closing Costs on Which Plaintiffs Based their SMLA Claims are not “Interest”**

The district court erred by concluding that the face of Plaintiffs Complaint alleged that a national bank charged Plaintiffs unlawful “interest.” The Complaint did not state any claim for excessive interest, or otherwise charge GNBT or any other Defendant with usury. As the face of the Complaint made clear, Plaintiffs’ state law claims were based on Defendants’ alleged violations of the SMLA, § 408.233.1, (which covers **non-interest** charges) -- not on a violation of NBA § 85 (12 U.S.C. § 85), § 408.030.1, § 408.232.1, or any other state or federal interest

rate law.

Plaintiffs alleged that each of the Missouri “residential second mortgage loans” at issue in the case was made in violation of the SMLA -- not because the rate of interest charged was excessive or usurious -- but because the homeowner-borrowers were charged and paid “loan origination” or “loan discount” fees (which were actually “finder’s fees”), and certain other closing costs (viz., “underwriting,” “application,” “settlement/closing,” “abstract or title search,” “title examination,” “document review” and “processing” fees) in violation of the SMLA, § 408.233.1 RSMo. (OP, ¶¶66-68, 71-72, 74-75, 77-78) Plaintiffs alleged (and should be permitted to prove) that GNBT, the only entity whose involvement arguably renders the NBA applicable to the “interest” rate component of the loans, did not actually charge or received the loan origination and discount fees at issue. (Id. ¶¶5-32). Plaintiffs further expressly alleged (and should be allowed to prove) that the unlawful loan charges were NOT interest, but were non-interest in nature. (Id., ¶¶4, 68, 72, 75, 78)

The district court ignored these allegations and resolved the facts in favor of Defendants and removal, effectively concluding that, despite Plaintiffs’ express allegations to the contrary, GNBT was not a “front” and actually received all of the loan charges at issue as a part or bona fide loan transactions. Notably, however, Defendants did not refute Plaintiffs’ allegations with conclusive evidence showing

that GNBT actually made and funded the loans, did so in good faith, and actually received and kept each of the fees that as it represented it did. Nor did Defendants show that the loan charges at issue were paid solely as a “return” for the use of any money lent, or to otherwise obtain a favorable (lower) interest rate, rather than for a service related to the processing of the loan. As a result, the allegations of the Complaint went unchallenged and necessarily established that the unlawful closing costs from which Plaintiffs’ state law claims arose were beyond the reach of the NBA.

The recent decision in Hancock, 272 F.Supp.2d 608, is directly on point. In Hancock, the district court found that §§ 85 and 86 of the NBA did not preempt, completely or otherwise, the plaintiff-mortgagees’ state law claims for the unlawful assessment of a non-interest (fax) fee. Id. at 610 (concluding that the “pre-emptive force” of §§ 85 and 86 as recognized in Anderson did not exist with respect to claims based on a “non-interest service fee”). The result in this case should be the same.

**B. Not Every Fee Assessed in Connection with a Second Mortgage Loan Qualifies as “Interest”**

Not every fee that a national bank charges in connection with a loan qualifies as “interest” for purposes of the NBA. Both 12 C.F.R. § 7.4001 and the Supreme Court opinion in Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) make this point clear. Only those fees representing a “payment

compensating a creditor ... for an extension of credit [(i.e., the actual “loan” of money], making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended” actually qualify as interest. 517 U.S. at 741-42. “[A]ll other payments” (i.e., charges assessed for something other than merely making the loan, e.g., finding a borrower, completing and recording the paper work needed to make and formalize the loan) are deemed and treated as something other than “interest.” See id.; 12 C.F.R. § 7.4001(a) (“interest” under § 85 does not include “appraisal fees ... finders’ fees, fees for document preparation or notarization, or fees incurred to obtain credit reports,” etc.). As the Court in Smiley stated:

It seems to us perfectly possible to draw a line, as [§ 7.4001] does, between (1) “payment compensating a creditor or prospective creditor **for an extension of credit**, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended,” **and (2) all other payments**. To be sure, in the broadest sense all payments connected in any way with the loan – **including reimbursement of the lender’s costs in processing the application, insuring the loan, and appraising the collateral** – can be regarded as “compensating [the] creditor for [the] extension of credit.” But it seems to us quite possible and rational to distinguish, as the regulation does, between **those charges** that are specifically assigned to such expenses [and which are non-interest] **and those that are assessed for simply making the loan, or for the borrower’s default** [which are interest].

517 U.S. at 741-42 (emphasis added); see also OCC Interp. Letter 803, 1998 WL 320183 (Oct. 7, 1997) (“[a fee] that ‘is specifically assigned’ to cover the cost of an activity or service, such as those listed in § 7.4001(a), pertinent to making the

loan” is “clearly” not interest”). The closing costs at issue in this case fall squarely within the non-interest category.

As the allegations of the Complaint make clear, the “loan origination,” “loan discount,” “underwriting,” “application,” “settlement/closing,” “document review” and “processing” fees on which Plaintiffs based their claims were assessed for services ostensibly performed in connection with processing the loans – services separate and apart from the mere extension of credit – specifically, charges and fees associated with “finding” borrowers and processing and completing the paperwork needed to finalize and record the second mortgage loans. (OP, #7, ¶¶2-4, 5-39, 67-69, 72, 75, 78) The HUD-1’s for the loans as offered by Defendants substantiate this point. (Add. 20-22) The HUD-1’s show that all of the subject fees were charges specifically assigned to cover the cost of a particular activity or service, such as those listed in § 7.4001(a), pertinent to making the loans. (Id.: lines 801-02, 811, 813, 1101, 1112, 1113)

None of the charges or fees on which Plaintiffs based their SMLA claims was assessed and paid to the “lender”; nor were they paid to a lender merely for making a loan (i.e., “interest” in another form). Such expenses and fees are not “interest” within the meaning of NBA. See 12 C.F.R. § 7.4001(a) (defining “interest” as used in NBA § 85 and expressly excluding “appraisal fees,” “finders’ fees,” and “document preparation or notarization fees incurred to obtain credit

reports” from the definition); Smiley, 517 U.S. at 741-42 (payments made in “reimbursement of the lender’s costs in processing the application, insuring the loan, and appraising the collateral” and other charges specifically assigned to such expenses are not “interest” for purposes of the NBA); Doe, 107 F.3d at 1302 (8<sup>th</sup> Cir. 1997) (federal definition of interest does not include insurance premiums charged in connection with a loan by a national bank); Video Trax, 33 F.Supp.2d at 1041 (term “interest rates” as used in the NBA does not include contingent default fees, such as overdraft fees).<sup>8</sup>

Hence, Plaintiffs’ state law claims for non-interest charges could not be removed to the federal courts. Sections 85 and 86 simply do not apply. Hancock, 272 F.Supp.2d at 610; Video Trax, 33 F.Supp.2d at 1048; Smith, 971 F.Supp. at 517 (“[w]ithout a showing that [the] ... charge is covered by ... the NBA’s definition of interest, the NBA has no impact on [the] action”); City Nat. Bank v. Edmisten, 681 F.2d 942, 945 (4<sup>th</sup> Cir. 1982) (case did not arise under §§ 85 or 86 where rate of interest charged was not at issue). The district court’s contrary decision resulted in part from its misinterpretation of the OCC’s definition of

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<sup>8</sup> The same result is reached if the Court applies Missouri law. See Video Trax, 33 F.Supp.2d at 1050 (“Congress may look to the laws of the states to define the term ‘interest,’ as well as to set the allowable rate of interest”). The SMLA makes clear that the subject fees and closing costs are principal, not interest. See § 408.231.2 RSMo (“‘principal’ of a second mortgage loan” includes additional charges permitted by § 408.233.1 when financed); compare §408.232 (rates and terms of “interest”) and § 408.233.1 (referring to “additional” charges “other than those permitted by Section 408.232” (the “interest” section)).

“interest,” 12 C.F.R. § 7.4001.

Although it cited the OCC definition, the district court misapplied it, essentially holding that all of the loan charges at issue here were “interest” since they were the types of charges that are generally not collected unless a loan is made. (Add. 10) That is not correct. The loan charges at issue here were the type of charges that generally are not collected unless a loan is made. The loan charges here were nevertheless **non-interest** charges under the OCC definition. The OCC definition identifies “appraisal fees,” “document preparation” and notarization fees” as non-exclusive examples of **non-interest** charges. These are the types of charges on which Plaintiffs’ based their claims. Yet, these charges generally are not collected unless [the] loan is actually made.” See 12 C.F.R. § 7.4001(a). The court’s misinterpretation of § 7.4001(a) compounded its misreading of the Complaint.

### **C. The District Court Should have Treated Plaintiffs’ Allegations as True**

As the parties seeking to invoke the jurisdiction of a federal court, Defendants had the burden of showing that removal was proper. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Green, 279 F.3d 509, 596 (8<sup>th</sup> Cir. 2002); In re Bus. Men’s Assurance Co. of Am., 992 F.2d 181, 183 (8<sup>th</sup> Cir. 1993). In addition to this burden, Defendants were also faced with the fact that removal statutes are strictly construed against removal and must be read

such that the district court resolves all doubts about federal jurisdiction in favor of state court jurisdiction. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) Bus. Men's Assurance, 992 F.2d at 183; Couch v. White Motor Co., 290 F.Supp. 697, 699 (W.D. Mo. 1968).

When considering a motion to remand, a court accepts as true all relevant allegations contained in the complaint and construes all disputed questions and facts and any ambiguities in controlling state law in favor of the plaintiff. See Willy v. Coastal Corp., 855 F.2d 1160, 1163-64 (5th Cir.1988); Steel Valley Authority v. Union Switch and Signal Division, 809 F.2d 1006, 1010 (3<sup>rd</sup> Cir.1987), cert. dismissed, 484 U.S. 1021 (1988); Clark v. Beneficial Mississippi, Inc., 280 F.Supp.2d 570 (S.D. Miss. 2003); Kimmel v. Bekins Moving & Storage Co., 210 F.Supp.2d 850, 852 (S.D. Tex. 2002); In re: Ciprofloxacin Hydrochloride Antitrust Litigation, 166 F.Supp.2d 740, 747-48 (E.D.N.Y. 2001); Baum v. NGK Metals Corp., 155 F.Supp.2d 376, 379 (E.D. Pa. 2001).

In reaching its decision, the district court ignored these rules and Plaintiffs' express allegations to the effect that the closing costs giving rise to their SMLA claims were "not interest." (OP, ¶¶4, 5, 8, 23-24, 66-67, 69-78, 90) In addition, the district court overlooked or ignored Plaintiffs' allegations that that non-bank entities, not GNBT, effectively made the second mortgage loans at issue (OP, ¶¶5-32), which rendered the NBA (federal law) inapplicable to the loans and Plaintiffs'

claims. The court also failed to appreciate Plaintiffs' allegations to the effect that, although the paperwork may have showed them as being paid to GNBT, the loan origination, discount, underwriting and application fees were **actually paid to Equity Guaranty or its affiliates**, including the USA Title, as a part of an unlawful scheme to avoid Missouri law. (Id., ¶¶5-32) Plaintiffs **did not** allege, as the district court found, that the loan charges at issue were paid to GNBT, "which turned around and paid all or a portion of the fees to Equity Guaranty." (Add. at 11 n. 4) Plaintiff instead alleged that the subject fees "were represented to be paid to GNBT, but were instead paid, directly ... to Equity Guaranty LLC or an affiliated entity thereof and were in fact in the nature of finder's fees." (OP, ¶7) (emphasis added).

The above allegations were material and could not be overlooked since the fact that the loan charges at the heart of Plaintiffs' claims were paid to a non-bank entity instead of GNBT, a national bank, reveals that the closing costs were "non-interest" charges (i.e., the charges were **not** paid merely for the privilege of receiving the loan). In addition, Plaintiffs' allegations were material since they negated any arguable applicability of the NBA to Plaintiffs' claims. Even if the closing costs at issue were "interest," which Plaintiffs deny, the closing costs were not paid to or received by a national bank. If a national bank did not "make" the loans, the NBA does not apply. See, e.g., Goleta Nat. Bank v. Lingerfelt, 211

F.Supp.2d 711 (E.D.N.C. 2002) (“while it is true that the NBA does preempt state efforts to regulate the interest collected by national banks, the NBA patently does not apply to non-national banks”); cf. Terry v. Community Bank of Northern Virginia, 255 F.Supp.2d 817, 821 (W.D. Tenn. 2003) (refusing to dismiss state law claim for excessive interest under federal preemption doctrine since the issue over whether a Community Bank, as opposed to GMAC-RFC, was the actual lender had not been determined).<sup>9</sup> The district court erred when it refused to remand this case back to state court.

**D. The District Court Glossed Over the Fact that Some of the Loan Closing Costs were Indisputably Paid to Third Parties for Services Rendered in Connection with the Loans, and thus, Were “Non-Interest” Charges**

The district court also erred by focusing on the “loan origination” and “loan discount” fees that were ostensibly charged for the subject loans, to the exclusion of all the other fees at issue in the case. The allegations of the Complaint were clear: Plaintiffs were charged and paid “settlement/closing,” “abstract or title search,” “title examination,” “document review,” and “processing” fees. These particular closing costs (and the “underwriting” and “application” fees as well) were **not** paid to a “lender” as a “return” for the use of any money lent, or to otherwise obtain a favorable (lower) interest rate. These closing costs were instead

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<sup>9</sup> The rent-a-charter scheme in Terry is similar to that at issue here and involved both the GMAC-RFC Defendants and Equity Guaranty. 255 F.Supp.2d 817.

undeniably associated with the work ostensibly performed to complete and process the paperwork needed to finalize and record the subject loans and were paid to non-bank entities - not GNBT.

The HUD-1's for Plaintiffs' loans show that the "settlement/closing," "abstract or title search," "title examination," "document review" and "processing" fees were specifically assigned to cover the cost of an activity or service pertinent to making the loan and were all ostensibly paid to USA Title. (Add. at 20-22) No party claims that these costs were paid to GNBT. Hence, these particular closing costs are plainly **non-interest** charges (even though they generally are not collected unless the loan is actually made). 12 C.F.R. § 7.4001; Hancock, 272 F.Supp.2d at 610; see Smiley, 517 U.S. at 741-42 (charges assessed for something other than merely making the loan [e.g., finding a borrower, completing and recording the paper work needed to make and formalize the loan] are deemed and treated as something other than "interest"). This Court should reverse the district court's jurisdictional decision on this ground as well. Green, 279 F.3d at 596 ("the term 'complete preemption' is somewhat misleading because even when it applies, all claims are not necessarily covered. Only those claims that fall within the preemptive scope of the particular statute, or treaty, are considered to make out federal questions").

**E. The Federal Courts do not Have Exclusive Jurisdiction to Determine Whether Loan Charges are “Interest” for Purposes of the NBA**

Plaintiffs submit that the district court also erred when it concluded that NBA §§ 85 and 86 completely preempt cases like this one, where the state law claims are not indisputably based on “interest” charges. Even though Congress may have expressly intended for NBA §§ 85 and 86 to completely preempt state law claims against a national bank for usurious “interest,” Anderson, 123 S.Ct. 2058, there is no indication that Congress likewise intended to vest the determination of whether or not a particular loan charge is in fact “interest” exclusively with the federal courts too. The state courts, just like the federal courts, can and should make this determination in the cases that plaintiffs chose to file before them – provided the state law claims are, like those at issue here, not indisputably based on “interest” charges. Granted, if a plaintiff files a state law case based on the assessment of loan charges that are indisputably “interest,” then the state court admittedly has no jurisdiction over the claims and the case could be removed; however, if the nature of the charges before the state court is disputed, as they arguably are here, then the state court should have jurisdiction over the case up until the point, if ever, that the charges giving rise to the state law claims are conclusively shown to be federal law “interest.”

Contrary to what the district court found, neither Plaintiffs nor the district

court (in its prior decision in Adkison) misread Eighth Circuit precedent in this regard. (Add. at 8) This Court in both Nahas, 930 F.2d 608, and Krispin, 218 F.3d 919, held that a state law claim against a national bank for excessive or usurious “interest” is completely preempted by NBA §§ 85 and 86. The Court did not hold that the determination of whether a particular state law claim is, in fact, a claim for excessive or usurious interest is completely preempted too. That issue was not before the Court. The claims before the Court in Nahas and Krispin were indisputably claims for unlawful “interest.” Consequently, Nahas and Krispin should be read just as Plaintiffs (and the district court in the Adkison case [JA126-151]) read them. Nahas and Krispin merely hold that that where state law claims, without dispute, arise from the assessment of unlawful (usurious) “interest,” then the federal remedy afforded by § 86 of the NBA completely preempts those state law claims. See Nahas, 930 F.3d at 609 (complaint sought to recover “interest paid in excess of the maximum lawful rate under Arkansas law, together with the usury penalty”); Krispin, 218 F.3d 922 (claimants alleged that credit card late fees violated Missouri law, which limited delinquency fees); see also Smith, 971 F.Supp. at 516-19 (“[w]ithout a showing that [the]...charge is covered by...the NBA’s definition of interest, the NBA has no impact on this action”); Cf. Kenney v. Farmer Nat’l Bank, 938 F.Supp. 798 (M.D. Ala. 1996) (cases addressing preemption of state law claims for excessive “interest” are distinguishable from

those cases involving a question of whether the NBA completely preempts state law claims challenging non-interest charges).

The recent opinion by the Supreme Court in Anderson adopted, but did not expand this rule. Just like the claimants in both Nahas and Krispin, the plaintiff in Anderson filed a state-court suit “to recover damages from a national bank for allegedly charging excessive interest in violation of [state usury laws]. 123 S.Ct. at 2060 (emphasis added). The Supreme Court held that such a state law usury claim may be removed to federal court under the doctrine of complete preemption. Id. Just as in Nahas and Krispin, the fact that plaintiff was making a “usury” claim in Anderson was a given:

Count IV of respondents’ complaint sought relief for “usury violation” and claimed that petitioners “charged ... excessive interest in violation of the common law usury doctrine” and violated “Alabama Code. § 8-8-1, et seq. by charging excessive interest.” App. 28. Respondents’ complaint thus expressly charged petitioners with usury.

Id. at 2063 (emphasis added).

For this reason the opinions in Anderson, Krispin and Nahas are all distinguishable. In all three cases, the fact that the plaintiff was making a usury claim was a given. This case is different. Here, Plaintiffs made no claim that their second mortgage loans violated either state or federal usury statutes. Rather, the violations are for illegal mortgage finder’s fees and other non-interest loan closing costs (“underwriting,” “application,” “review” and “processing” fees, etc.) charged

in violation of § 408.233.1 RSMo.

If anything, Anderson, Krispin and Nahas actually support Plaintiffs' point that the NBA does not completely preempt Plaintiffs' state law claims under § 408.233.1 of the SMLA. Like the courts in Smiley, Hancock, Video Trax, and Smith, this Court, too, recognizes that the involvement of a national bank in a case does not mean that the case must be removed. The court instead must look to the nature of the state law claim and remedies provided for an unlawful loan since Congress has not preempted the field of charges associated with making a loan. This Court in Nahas properly concluded:

When a plaintiff's action is brought under state law, the defendant is not entitled to remove simply because federal law or principles of federal preemption will provide a defense, even a complete defense, to plaintiff's state law claims. Under this doctrine, in areas other than usury, national banks have been denied removal even though the National Bank Act would ultimately control all or part of plaintiff's state law action."

Nahas, 930 F.2d at 611 (emphasis added); accord Krispin, 218 F.3d at 922 ([w]e have held that Sections 85 and 86 ... completely preempt state law claims of usury brought against a national bank); Doe, 107 F.3d 1297 (insurance premiums charged to borrower's account did not constitute "interest" within the meaning of usury provisions of NBA).

Moreover, Plaintiffs alternatively submit that, even if the district court did have the exclusive right to pre-try a critical issue in the case and properly could

determine whether or not the loan charges giving rise to Plaintiffs' claims were "interest," the court's determination in this regard was incorrect and should be reversed. As stated above, the charges at the heart of plaintiffs' claims were non-interest charges (loan closing costs) that Plaintiffs assert were charged and collected in violation of § 408.233.1, the non-interest limitation provision in the SMLA. The allegations of the Complaint on which the removal was based unambiguously established that fact, first because the closing costs were not paid to the "lender," and second because the closing costs were not paid to a "lender" solely for the extension of credit. The charges, instead, were associated with finding a borrower and completing and recording the paper work needed to make and formalize the loan. Defendants did not refute these allegations. Defendants did not produce any evidence to show that GNBT, as the lender, actually received and kept the various fees and/or that the subject loan charges were singularly assessed merely for making the loans. Defendants had the burden to show that removal was proper. That burden was not met. As a result, the Complaint showed that Plaintiffs' claims and this case were beyond the boundaries of "complete" NBA preemption. Hence, the district court lacked jurisdiction. To the extent there was any legitimate doubt, the district court should have resolved that doubt in favor of remanding the case.

## **F. Plaintiffs Did not Engage in “Artful Pleading”**

Defendants will undoubtedly argue that Plaintiffs engaged in “artful pleading” and deliberately omitted to plead a federal law element to their SMLA claims. Rivet, 522 U.S. at 475. This does not make sense. There was no “artful pleading” here.

The allegations of the Complaint are clear: The “loan origination,” “loan discount,” “underwriting,” “application,” “settlement/closing,” “abstract or title search,” “title examination,” “document review” and “processing” fees on which Plaintiffs based their claims were **not** charges paid to a “lender”; nor were the charges paid as a “return” for the use of any money lent, or to otherwise obtain a more favorable (lower) interest rate. All of the closing costs were instead associated with “finding” borrowers and/or completing the paperwork needed to process and record the subject second mortgage loans (and were paid to non-bank entities). The closing costs were charges specifically assigned to cover the cost of an activity or service pertinent to finding and making the loans. The closing costs also violated Missouri law, namely: § 408.233.1 RSMo. Plaintiffs’ position and claims have merit and are viable as a Missouri state law claims. See §§ 408.233.1, 408.236, 408.562 RSMo. Plaintiffs have a state law remedy and it arises by virtue of Missouri law, and in the absence of federal law. There is no federal law element to Plaintiffs’ SMLA claims. Hence, Plaintiffs have not failed to plead any

necessary federal question.

#### **IV. The District Court Lacked Jurisdiction, and Thus, did not Have the Authority to Dismiss Plaintiffs' State Law SMLA Claims**

The district court granted Defendants' Rule 12(b)(6) motions to dismiss. It did so based entirely on its conclusion that NBA §§ 85 and 86 completely preempted Plaintiffs' state law claims. (Add. at 12) Because the district court's decision was premised on its erroneous determination that Plaintiffs' state law claims were actually federal law claims over which the court had subject matter jurisdiction, the court's concomitant finding that the Complaint failed to state a federal law claim for which relief could be granted was erroneous too. The district court did not have jurisdiction to dismiss Plaintiff's state law claims. See Nichols, 284 F.3d at 863. Accordingly, the Court should vacate the Order granting the motions to dismiss.

#### **CONCLUSION**

For the foregoing reasons, the Court should reverse the district court's jurisdictional decision, remand the case to the district court with instructions to grant Plaintiff's Motion to Remand (W.D. Doc. #16), and vacate the Order dismissing Plaintiffs' claims on the grounds that the district court did not have jurisdiction.

Dated: November 12, 2003

Respectfully Submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief complies with the word count limitation in that, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), it contains no more than 14,000 words. This brief was prepared using Microsoft Word software.

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I certify that ten (10) copies of this brief, together with a 3½ inch diskette containing a digital version thereof, were given on this 12<sup>th</sup> day of November 2003 to a commercial carrier for overnight delivery to:

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